IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1593

DONALD G. COX,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATUTES AND REGULATIONS

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No.....

DONALD G. COX,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the Court of Appeals of the State of Washington that was entered in this case on June 29, 1977. A Petition For Review of that decision was denied by the Supreme Court of Washington on January 20, 1978.

OPINION BELOW

The opinion of the Court of Appeals of the State of Washington is reported in 566 P2d 935. Petitioner's Motion For Reconsideration was denied by that court on July 13, 1977. His Petition For Review to the Supreme Court of the State of Washington was denied by notation Order entered on the court's Petition For Review

docket on January 20, 1978. Copies of the opinions, decisions and orders referred to herein are attached to this Petition as Appendices A, B, C and D.

JURISDICTION

The Court of Appeals of the State of Washington entered its decision against the Petitioner on June 29, 1977, and denied Petitioner's Motion For Reconsideration on July 13, 1977. The Supreme Court of Washington entered its notation Order denying a Petition For Review of the Court of Appeals decision in its Petition For Review docket on January 20, 1978. The Petitioner filed an Application For Extension of Time in which to file a Petition For Writ of Certiorari in this court, but that Application was denied by the Honorable William H. Rehnquist, Associate Justice, on April 19, 1978. For reasons set forth in that Application, the Petitioner requests that leave be granted for the submission of this Petition out of time. The jurisdiction of this court is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

1. Did the Washington Court of Appeals erroneously apply and follow overruled Federal Securities Law in determining the meaning and scope of similar state statutes relating to the unlawful sale of securities?

2. In determining the meaning and scope of the Washington Securities Act, did the Washington Court of Appeals base its decision on Federal law that was contrary to the decision of this court in *Ernst & Ernst v. Hochfelder*, 425 US 185?

3. Does the Washington Court of Appeals decision conflict with the principles of law laid down by this court in *Ernst & Ernst v. Hochfelder*, 425 US 185?

4. In deciding the meaning and scope of its State Securities Act, can the Washington Court of Appeals base its decision on Federal law that has been overruled and superseded by this court?

5. Is specific intent to deprive another of his property at the actual time of taking a necessary element of the crime of Grand Larceny?

6. Did the Washington Court of Appeals erroneously approve the trial court's instructions on Grand Larceny?

STATUTORY AND REGULATORY PROVISIONS

The Washington State Securities Act is found in Revised Code of Washington, Title 21.20.010, and reads as follows:

> "It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> (1) To employ any device, scheme, or artifice to defraud;
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

SEC Rule 10b-5 of the Federal Securities and Exchange Act is found in 17 CFR §240.10b-5, and reads as follows:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instru-

mentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud;

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

The Washington statute on Grand Larceny is found in Revised Code of Washington, Title 9.54.010(2), and reads as follows:

"Every person who, with intent to deprive or defraud the owner thereof —

(1) Shall take, lead, or drive away the property of another;

• • • • • •

steals such property and shall be guilty of larceny."

9.54.090 clarifies the meaning of Grand Larceny as follows:

"Every person who steals or unlawfully obtains, appropriates, brings into this State, buys, sells, receives, conceals, or withholds in any manner specified in RCW 9.54.010 —

(6) Property of the value of more than $75.00 in any manner whatever; shall be guilty of Grand Larceny and be punished by imprisonment in the State Penitentiary for not more than 15 years."

STATEMENT OF THE CASE

Petitioner was charged in the Superior Court of the State of Washington in and for the County of Spokane with Aiding and Abetting Grand Larceny and the Unlawful Sale of Securities, in violation of applicable Washington statutes. Defendant requested the court to instruct the jury that specific intent to defraud and deprive the owner of his property had to be present at the time of the taking before defendant could be convicted of the Grand Larceny charge. Defendant also asked the Court to instruct the jury that before he could be convicted of the Securities Act violation, the prosecution had to prove that defendant harbored a criminal intent to defraud and deprive the owner of his money or property. The trial court refused these requested instructions, and timely exceptions were taken by trial counsel. (Tr. 400-404, 415, 417) The jury returned a verdict of guilty, and defendant appealed. The question of the adequacy of those instructions was raised on that appeal.

The Washington Court of Appeals upheld the Superior Court in its refusal to give the requested instructions on criminal intent. It ruled that the deficiency in the Grand Larceny instruction was cured by other jury directives, and that the instructions defining the acts necessary to commit a Securities Act violation were sufficient. In support of its ruling on this latter point, the court turned to Federal law as a guide. A number of Second Circuit civil cases interpreting the provisions of SEC Rule 10b-5, which is very similar to the Washington statute, were cited by the Washington Court to show that a specific intent to defraud is unnecessary to constitute a violation of the Securities Act. In doing so, the Washington Court overlooked the ruling of the Supreme Court in *Ernst & Ernst v. Hochfelder*, 425 US 185, which held

that no action for damages may lie under 10(b) of the Securities Exchange Act of 1934, 15 USC §78j(b), and Securities Exchange Commission Rule 10b-5, 17 CFR §240.10b-5, in the absence of an allegation of intent to deceive, manipulate or defraud on the part of the defendant. In other words, the Supreme Court held that "scienter" is necessary in Federal cases. The Hochfelder case overruled all of the decisions cited by the Washington Court of Appeals in support of its holding that specific intent to defraud was not necessary in securities cases.

The Petitioner brought this question to the attention of the Supreme Court of Washington in his Petition For Review, but that Petition was denied, and a higher State court review was never made. Petitioner now asks the Supreme Court to accept this case and make a determination of the feasibility of using erroneous Federal law as a basis for State court decisions.

The Petitioner submits that the matter now before the court presents a Federal question that gives sufficient jurisdiction for this Court to proceed with a final determination. This Court has previously held in *A. C. Frost & Company v. Coeur D'Alene Mines Corporation,* 61 S.Ct. 414, 312 US 38, that a Federal question arises where the action of the State Court is based upon the interpretation and application of the Federal Securities Act. This is certainly such a case.

This court has also granted certiorari in a case where the State Court decision was contrary to a Supreme Court decision, and the conflict required a clarification by this Court. *Williams v. State of Georgia,* 75 S.Ct. 814, 349 US 375. The State Court here, through its own folly, has certainly brought about a conflict that should be resolved by this body.

REASONS FOR GRANTING THE WRIT

I. This case presents a novel question of great importance that requires clarification by this court.

Noting that Washington law provided little guidance in determining if specific intent was necessary to convict a defendant charged under Washington Securities Statutes, and observing that those statutes were essentially the same as SEC Rule 10b-5 of the Federal Securities and Exchange Act, the Court of Appeals then discussed and followed a number of Federal cases construing Federal laws and regulations that were similar to the State security statute. This was not an unusual procedure. It is certainly proper for State courts to review Federal law in such cases. However, if Federal law is to be used as a basis for State interpretation, it seems only proper that sound, viable, well-grounded and valid cases should be followed in making such important determinations. There seems to be little value in basing State interpretation on overruled and unsound concepts of law. All of the Federal cases cited in the Court of Appeals decision in support of its final ruling in this case have been overruled by the Supreme Court in the case of *Ernst & Ernst v. Hochfelder, supra.* These cases can no longer be followed by the Federal Court. The need for showing specific intent to defraud in Federal jurisdictions is now absolute. The Washington Court of Appeals either overlooked or ignored the *Hochfelder* case. Because of this, it was applying former and not present Federal law in making its decision.

The question raised by this unusual set of circumstances is certainly a novel one that is worthy of careful consideration by the Justices of this Court. As far as Petitioner's counsel can determine, the basic question in

this case has never come before this Court. For this reason, the Court should clarify the law pertaining thereto.

II. The lower court decision has created great uncertainty, confusion and misunderstanding.

Petitioner has drawn in question the ruling of the Washington Court of Appeals on grounds that its determination is in conflict with the very Federal law on which it relies. The decision below is clearly at odds with the holding of this court in *Ernst & Ernst v. Hochfelder, supra.* The standard of conduct for the seller of securities under Washington State law now differs greatly from the standard required by the Federal Securities Act. The concept of "intent to defraud" is now significantly different in the Washington State and Federal courts. What is now an innocent mistake under Federal law may be a serious felony under State statutes. These circumstances create great uncertainty and confusion for those who deal in securities in the State of Washington. A seller, relying upon his knowledge of Federal law, might unwittingly find himself in violation of State statutes. Without a specific intent to defraud and completely absent any "scienter" on his part, he could find himself being charged with a serious State criminal violation. The extension of this concept to non-resident traders can work an even greater folly in cases where the sales are not satisfactory to the buyer.

It has long been recognized that effective regulation of the securities market must be carried out on a National level, with Federal guidelines to be used as a standard to determine culpability for loss, damage and criminal activity. This Court has now laid down an important rule with respect to the recovery of damages in the absence of intent to deceive, manipulate or defraud on the part of the defendant. This principle will surely carry over

into criminal cases. Most states will probably follow that concept when construing their own laws and regulations. Washington will be the exception to that rule. Those engaged in selling securities in that State will find themselves doing so at their peril, with the chance of being charged with a serious crime for acts that would not be illegal in other jurisdictions. This entanglement between Federal and State laws and the uncertainty created by the Court of Appeals ruling should be resolved by this Court.

The question now before the Court also has obvious public importance. As noted, the path of the practitioner who would undertake to advise a seller of securities in Washington is now somewhat uncertain. A cautious approach is imperative in such matters. It should be noted that this Court has sometimes granted a Writ of Certiorari because of the public importance of the question presented. *Lau v. Nichols,* 94 S.Ct. 786, 414 US 563.

III. The Court of Appeals ruling was erroneous under then-existing Federal law.

The Court of Appeals decision is contrary to legal principles laid down by the Supreme Court. It appears that if the Washington Court had applied correct Federal law, the result of its deliberations would have been otherwise. In other words, if the Court of Appeals had held that "scienter" was necessary for conviction of the defendant of Securities Act violations, reversal of the lower court decision would have been mandatory. Therefore, the rights of the Petitioner were greatly prejudiced by the mistake in the application of Federal law.

Where a proper Federal question is before the Court, but is mixed with non-Federal questions, sound logic requires that this Court should decide the entire case with-

out making any division of Federal and non-Federal issues. The trial court's instructions on Grand Larceny and the need for specific intent to deprive another of his property at the time of taking are matters that can be easily disposed of by the Court in connection with its consideration of the matters set forth above.

CONCLUSION

For reasons set forth herein, a Writ of Certiorari should issue to review the judgment and opinion of the Washington Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

FILED JUNE 29, 1977

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

No. 1873-III
DIVISION THREE

STATE OF WASHINGTON,
Respondent,

v.

DONALD COX,
Appellant.

MUNSON, C. J. — Defendant was found guilty of one count of grand larceny (RCW 9.54.010(2)) and one count of unlawful sale of securities (RCW 21.20.010).[1] He now challenges: the sufficiency of the evidence on each count, several of the court's instructions, and the failure to give several proposed instructions. We affirm.

A challenge to the sufficiency of the evidence admits the truth of the evidence of the party against whom the challenge is made and all inferences reasonably drawn therefrom and further requires that the evidence be interpreted most strongly against the challenger and in a light most favorable to the opposing party. *State v. Murray*, 10 Wn. App. 23, 516 P.2d 517 (1973); *State v.*

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[1] "It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

"(1) To employ any device, scheme, or artifice to defraud;

"(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

"(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

Sanders, 7 Wn. App. 891, 503 P.2d 467 (1972). Considered in this light, the jury was entitled to find:

(1) That the defendant, in the company of Robert Shultz, visited the victim on October 12, 1973, and advised her (a) that there was a corporation formed to develop land adjacent to Lake *Roosevelt;* (b) that Mr. Cox had already invested $20,000 and contemplated building a home on one of the units; (c) that the plat had been filed; and (d) that another party had already invested in the corporation and a third party contemplated investing.

(2) That in reliance upon these allegations, the victim gave to the defendant and Mr. Shultz a post-dated check for $20,000. When the date on the check neared and she had been unable to sell other stock in order to cover the check, the victim asked that they withhold depositing it until the sale could be completed. Ultimately, she took out a loan to cover the check and subsequently sold other stock to pay back the loan.

(3) That the check cleared on November 15, 1973.

(4) That 3 days before the check cleared, Mr. Shultz used the check to open a bank account in the name of Columbia River Land and Development Company, a trade name rather than a corporate name, and on the same day he wrote a $5,000 check to defendant.

(5) That on January 15, 1974, articles of incorporation of Columbia River Land and Development, Inc., were filed by the secretary of state listing the victim as a director.

(6) That on February 1, 1974, Mr. Shultz ordered 100 stock certificates from a printer in Spokane and ultimately delivered to the victim certificate No. 104 which showed her holdings to be 8,000 shares.

(7) That defendant and Shultz represented to the victim that even though the sale of property might not reach their expectations, the value was such that they could always sell the land and get their money back, but that they anticipated increasing the value from $20,000 to $80,000 within a given period of time.

Although many of these statements were contested by the defendant, the veracity of the witnesses and the weight of such statements were matters to be considered by the jury. *Arthurs v. National Postal Transport Ass'n*, 49 Wn.2d 570, 304 P.2d 685 (1956). We find there was sufficient evidence upon which to base convictions on both counts, particularly since the defendant did not have a valid license to sell securities within this state at the time these transactions took place.

The defendant contends that the failure of the court to insert the words "specific intent" within the statutory definition of grand larceny (instruction No. 3)[2] and in

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[2] "INSTRUCTION NO. 3:

"Before you can find the defendant guilty of the crime of GRAND LARCENY, as charged in Count I of the Information, you must find from the evidence beyond a reasonable doubt all of the following elements:

"1. That the said ROBERT SHULTZ, in the County of Spokane, State of Washington, on or about between October 12, 1973, and April 18, 1974, then and there being, did then and there wilfully and unlawfully, with intent to deprive and defraud the owner thereof, obtain from ANNABELLE G. HEIDECKER a sum of money in excess of $75.00 in lawful money of the United States, the property of and belonging to the said ANNABELLE G. HEIDECKER;

"2. That the said ROBERT SHULTZ obtained such money by color and aid of false and fraudulent representation and pretenses;

"3. That such representations were false, the said ROBERT SHULTZ and defendant, DONALD COX, knowing the same to be false;

"4. That said ANNABELLE G. HEIDECKER believed said representation, relied thereon, and was deceived;

"5. That the said defendant, DONALD COX, in the County of Spokane, State of Washington, on or about between October 12, 1973 and April 19, 1974, then and there being, did then and there wilfully and unlawfully aid, abet, counsel and encourage ROBERT SHULTZ in the commission of the crime of GRAND LARCENY as aforesaid.

"If you find that any of the foregoing elements have not been established

the instruction relating to unlawful sales of security (instruction No. 5)[3] is reversible error. We disagree.

Instructions of the court are to be read as a whole. *Webley v. Adams Tractor Co.*, 1 Wn. App. 948, 465 P.2d 429 (1970). Defendant's objections to instruction Nos. 3 and 5, because they lacked the term "specific intent" and because they failed to state that said intent must exist at the time the money was obtained, are not well taken. "Willfully" (instruction No. 8) and "specific in-

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by the evidence in this case beyond a reasonable doubt, you must acquit the defendant of the crime of GRAND LARCENY, but if you find all of these elements have been established by the evidence in this case beyond a reasonable doubt, you must find the defendant guilty of GRAND LARCENY."

[3] "INSTRUCTION NO. 5:

"Before you can find the defendant guilty of the crime of UNLAWFUL SALE OF SECURITIES, as charged in Count II of the Information, you must find from the evidence beyond a reasonable doubt all of the following elements:

"1. That the said ROBERT SHULTZ, in the County of Spokane, State of Washington, on or about between October 12, 1973 and April 19, 1974, then and there being, did then and there wilfully and unlawfully, either

"(a) Employ any device, scheme or artifice to defraud, or

"(b) Make any untrue statement of material fact or omit to state a material fact necessary in order to make the statement made in light of the circumstances under which it was made, not misleading, or

"(c) Engage in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person;

"2. That said act or acts were done in connection with the offer or the sale of securities to ANNABELLE G. HEIDECKER;

"3. That the said defendant, DONALD COX, in the County of Spokane, State of Washington, on or about between October 12, 1973 and April 19, 1974, then and there being, did then and there wilfully and unlawfully aid, abet, counsel and encourage ROBERT SHULTZ in the commission of the crime of UNLAWFUL SALE OF SECURITIES as aforesaid.

"If the State has failed to establish by the evidence in this case, beyond a reasonable doubt, any one of the foregoing elements, then you must acquit the defendant, DONALD COX, of the crime of UNLAWFUL SALE OF SECURITIES, as charged in Count II of the Information.

"With respect to elements 1(a), 1(b), and 1(c), these are alternatives, and it is only necessary for the State to prove either 1(a), 1(b), or 1(c); however, it is necessary that all of you agree either to 1(a), 1(b), or 1(c) in order to return a verdict of guilty.

"On the other hand, if the State has established by the evidence beyond a reasonable doubt all of the foregoing elements, it will be your duty to find the defendant, DONALD COX, guilty of the crime of UNLAWFUL SALE OF SECURITIES."

tent" (instruction No. 15) were properly defined. Related instructions stated that intent is a mental state which may be inferred from the circumstances and that a person intends the natural and probable consequences of his acts. Taking the instructions as a whole, we find the jury was adequately instructed. *Nelson v. Mueller*, 85 Wn.2d 234, 533 P.2d 383 (1975).

The defendant contends that the court's instruction No. 5 is inadequate on the basis that it fails to require the necessary intent to defraud and deprive. The first portion of this instruction specified the activities which constitute unlawful sale of securities and is based upon statutory language. Subsections (1.) and (3.) specifically require an intent to defraud or deceive, whereas subsection (2.) does not. The defendant's proposed instruction would add an intent to defraud or deprive as an element under subsection (2.) We conclude that an intent to defraud is unnecessary in a violation of subsection (2.), *i.e.*, making or failing to make a misleading statement of a material fact. The defendant relies upon *State v. Hynds*, 84 W.2d 657, 663, 529 P.2d 829 (1974), and cases cited therein as requiring that a "specific intent to defraud must be proven." The federal cases cited in *Hynds* all involve mail fraud; the federal mail fraud statute specifically requires an intent to defraud; thus, they are distinguishable.

Although an action described under RCW 21.20.010 constitutes an unlawful sale of securities, criminal liability does not attach to such action unless that person wilfully performed the act. *State v. Hynds, supra; Shermer v. Baker*, 2 Wn. App. 845, 472 P.2d 589 (1970); RCW 21.20.400. In determining whether instruction No. 5 sufficiently defied the intent necessary for criminal sale of securities, this court must consider the necessary in-

tent under both RCW 21.20.010 and .400. Our present law provides little guidance in determining the specific intent necessary under these two statutes. RCW 21.20.010 is essetially the same as Rule 10b-5 of the Federal Securities and Exchange Act.[4] *Shermer v. Baker, supra.* Furthermore, the first portion of RCW 21.20.400 is essentially the same as the first portion of the federal statute.[5] Therefore, it is proper for this court to consider the federal court's interpretation of these federal statutes in determining the intentions necessary for a criminal violation of this state statute. *Accord, State v. Hynds, supra; Shermer v. Baker, supra.*

In considering Rule 10b-5 (similar to RCW 21.20.010), the federal cases reflect that a specific intent to defraud is unnecessary; but it is necessary that there be more than a showing of mere negligence. *See Republic Technology Fund, Inc. v. Lionel Corp.*, 483 F.2d 540 (2d Cir. 1973); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 363 (2d Cir. 1973); *Securities & Exchange Comm'n v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972); *Shemtob v. Shearson, Hammill & Co.*, 448

[4]17 C.F.R. § 240.10b-5 at 392 (1976) states:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To encourage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
on connection with the purchase or sale of any security."

[5]15 U.S.C. § 78ff(a) provides in relevant part: "Any person who wilfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, . . ." if convicted is subject to fine or imprisonment. RCW 21.20.400 provides in relevant part: "Any person who wilfully violates any provision of this chapter . . ." if convicted is subject to fine or imprisonment.

F.2d 442 (2d Cir. 1971); *Securities & Exchange Comm'n v. Texas Gulf Sulphur Co.*, 401 F.2d (2d Cir. 1968); Annot. 3 A.L.R. Fed. 819 (1970). Furthermore, those cases dealing with the federal statutory equivalent to RCW 21.20.010(2) specifically state that an intent to defraud or deprive is not necessary to constitute a violation of the misleading statement section. *Securities & Exchange Comm'n v. Texas Gulf Sulphur Co., Supra;* Annot. 3 A.L.R. Fed. 819, 826-26 (1970); *accord United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976) (failure to include a statement of indebtedness in a proxy statement); *Securities & Exchange Comm'n v. Manor Nursing Centers, Inc., supra* (the prospectus was misleading); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972) (3-year securities statute of limitations applicable rather than 5-year statute of limitations for common-law fraud.) Therefore, a violation of RCW 21.20.010(2) does not require a specific intent to defraud. The making of an untrue statement is sufficient.

The language in *Hynds* provides additional support that an intent to deceive or deprive is not necessary to constitute an unlawful sale of securities under subsection 2. In discussing the instructions given by the trial court in *State v. Hynds, supra* at 664, the court stated:

> These instructions do not use the precise language of the federal decisions; however, they tell the jury that the violation of the securities act must be wilful, that the untrue statements must be intentionally made, and *that the defendant had to know in his own mind that his untrue statements would not occur, or* that the statements were made recklessly without knowledge of the facts and with intent to deceive. (Italics ours.)

To constitute a criminal sale of securities, the action must also be willful. RCW 21.20.400. Again, because of the lack of state interpretation in determining the mean-

ing of "wilful" under this statute, we have examined several federal cases. Under the federal statute, "one's actions are "wilful" if one has the intention to commit the action with the knowledge that such action is wrongful, with the additional proviso that "the knowingly wrongful act involved a significant risk of effecting the violation that has occurred." *United States v. Peltz*, 433 F.2d 48, 55, 20 A.L.R. Fed. 216 (2d Cir. 1970). *See United States v. Dixon, supra; United States v. Schwartz*, 464 F.2d 499 (2d Cir. 1972); Annot, 20 A.L.R. Fed. 227 (1974); Herlands, *Criminal Aspects of the Securities Exchange Act of 1934*, 21 Va. L. Rev. 139, 148-49 (1934). A knowledge that the wrongful act actually violates the securities act is unnecessary. *United States v. Schwartz, supra; United States v. Peltz, supra.*

Since the defendant challenges instruction No. 5 because it fails to require an intent to defraud or deprive, it is necessary to determine if that instruction set out the intentions necessary for a criminal sale of securities. The instruction first stated that the jury must find that Mr. Shultz wilfully and unlawfully committed one of the three acts under the unlawful sale of securities statute. The instruction also stated that in order to find the defendant guilty of unlawful sale of securities, it must also find that the defendant wilfully and unlawfully aided, abetted, counseled and encouraged Mr. Shultz in committing the unlawful sale of securities, as set out previously. An intention to defraud or deprive is not necessary when making or failing to make a statement as set forth in RCW 21.20.010. The court properly instructed the jury as to the meaning of the terms wilfully[6] and unlawfully.[7] Therefore, the trial court's instruction No. 5 was sufficient.

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[6]Instruction No. 8: "intentionally and purposely."

[7]Instruction No. 8: "without and beyond the authority of the law."

Defendant additionally assigns error to the court's instruction No. 16, contending that when contrasted with defendant's proposed instructions Nos. 1, 2, 3 and 16, it was incomplete, misleading and failed to properly define aiding and abetting. At trial, defendant failed to object to the court's instruction No. 16. Notwithstanding, we find that assignment is not well taken inasmuch as counsel was afforded sufficient opportunity to argue his theory of the case under the instruction as given by the court.

The defendant next contends that the court erred in failing to give his proposed instructions Nos. 7, 8 and 9. The court's instructions presented these issues with sufficient clarity to allow defendant to argue his theory. The court is not required to instruct in the words of a particular litigant so long as the instructions given allow the litigant to argue his theory of the case. *State v. Huff*, 76 Wn.2d 577, 458 P.2d 180 (1969).

The same may be said for defendant's contention that the court erred in failing to give his proposed instruction on the burden of proof. The court's instructions Nos. 7 and 17 dealt with this issue; at trial the defendant failed to take exception to the court's instructions; therefore, they become the law of the case. *O'Brien v. Artz*, 74 Wn.2d 558, 445 P.2d 632 (1968).

Lastly, the defendant contends that the court erred in failing to give his proposed instruction on circumstantial evidence. The defendant's proposed instruction was overruled and rejected in *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975); the court properly refused to give that instruction.

Judgment is affirmed.

C. J. MONSON

WE CONCUR:

J. GREEN

J. McINTUFF

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

No. 1873-III
Division Three

STATE OF WASHINGTON,

Respondent,

v.

DONALD COX,

Appellant.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court has considered the Motion for Reconsideration and that Motion is denied.

DATED: July 13, 1977.

Ray E. Munsen
Chief Judge

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No.....

STATE OF WASHINGTON,

Respondent,

vs.

DONALD G. COX,

Appellant.

PETITION FOR REVIEW TO SUPREME COURT

PETITIONER'S OPENING BRIEF

A. *IDENTITY OF PETITIONER*

DONALD G. COX asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. *COURT OF APPEALS PETITION*

The Petitioner asks that the Supreme Court review Headnotes 4, 5, and 6 of the Court of Appeals decision, which was filed on June 29, 1977. Petitioner's Motion for Reconsideration was denied July 13, 1977. A copy of the Court of Appeals decision is attached hereto and marked Exhibit A. A copy of the Order Denying Petitioner's Motion for Reconsideration is also attached hereto and marked Exhibit B.

C. *ISSUES PRESENTED FOR REVIEW*

(1) Can the State Court of Appeals, in an attempt to apply similar federal law relating to the same subject matter, erroneously apply federal law in interpreting a violation of R.C.W. 21.20.010(2) and hold that a violation of such statute does not require a specific intent to defraud, *and the making of an untrue statement is sufficient for violation of that statute* when the federal law is clear that *it is* necessary to show scienter, wilfullness and specific intent and that mere negligent conduct is not enough. See *Ernst and Ernst v. Hochfelder,* 425 U.S. 185, 47 L.Ed.2d 668 (as contained in Appendix C, *Goodman v. ARI Industries, Inc., et al;* and, Appendix D, *Carroll v. Bear, Stearns & Co., et al.,* attached hereto).

(2) Does the Court of Appeals decision set forth herein in Appendix A, conflict with the principles of law laid down by the Supreme Court of the State of Washington in *State v. Hynds,* 84 Wn.2d 657, 663, 529 P.2d 829 (1974) requiring that a specific intent to defraud in a securities violation case as set forth in R.C.W. 21.20 *et seq.* must be proven by the State.

(3) Is the Court of Appeals correct in approving the trial court's Instructions No. 3 and No. 5 and rejecting Appellant's Instructions No. 7 and No. 9, where the Court's instructions failed to apprise the jury of the essential element of specific intent to deprive the owner of the property *at the time* of taking as far as the larceny violation is concerned, and Appellant's instruetions correctly state the essential element of the offense as alleged to be a violation of R.C.W. 21.20 so far as it instructs as to the requirement of specific criminal intent to deprive *at the time of taking.*

D. *STATEMENT OF THE CASE*

This is an appeal by DONALD G. COX from a judgment and conviction of a charge of aiding and abetting grand larceny and a violation of the securities act as set forth in R.C.W. 21.20.010 and 21.20.400 after trial with a jury before the Honorable George T. Shields in Spokane County. Notice of Appeal was timely filed, and an appeal was argued and heard before the Court of Appeals in January of 1977. On June 29, 1977, the Court of Appeals rendered its opinion which is set forth in Appendix A and for which this review is sought.

DONALD G. COX is 43 years old, married, and the father of five children, all who reside with him. Since 1963, he has been primarily engaged in the insurance business, and at the time of the facts in this case, was a licensed insurance salesman and district manager for the Life Insurance Company of the Northwest, located in Spokane (ST 280). He was successful in his endeavors and did quite well financially. (ST 364).

ANNABELLE HEIDECKER, the State's main witness and alleged victim, is college-educated (ST 79); had a work history of employment at Eastern Washington State College as a psychometrist in the guiding and counseling department (ST 80); invested previously to meeting MR. COX in Mutual Funds, had lost heavily in those transactions (ST 77); had expressed to Mr. COX that she was very interested in investments in land and security in general (ST 288; 285); and managed the books and income tax returns for her husband's contracting business (ST 84).

Mr. COX first contacted ANNABELLE HEIDECKER in September of 1973 on insurance business. Mrs. HEIDECKER was the holder of four life insurance poli-

cies at the time, and the purpose of this meeting was to review the policies and make adjustments or increase the coverage (ST 283). During the course of this meeting, Mrs. HEIDECKER volunteered information pertaining to her financial situation, and revealed that she had invested $40,000.00 in Mutual Funds, and had lost substantial amounts on those investments (ST 284; 285). At this time, Mrs. HEIDECKER applied for four additional policies for her children (ST 286).

Also in September of 1973, Mr. COX had been contacted by Mr. ROBERT SHULTZ (ST 289), an uninformed against co-defendant who later committed suicide after the facts and transactions in this case. Mr. COX had known Mr. SHULTZ for approximately ten years (ST 289) and had associated closely with him in Wyoming for 1½ years in the insurance business (ST 290). Mr. SHULTZ indicated that he had just completed a land development project in Texas and was looking for other development possibilities. Mr. SHULTZ then came to Spokane. He showed Mr. COX pictures, plots and brochures of the Texas development, stating that he had completed it and that there were only four or five lots left for sale (ST 293; 294). Mr. COX felt that the development, including a man-made lake, was very extensive and professionally accomplished, and was very impressed (ST 294). At this time, Mr. COX revealed to Mr. SHULTZ his knowledge of 650 acres of land for sale on Lake Roosevelt which he had previously looked at and negotiated upon for its purchase (ST 293). Mr. COX described this property and felt it had great potential for recreational development. The lake and the land was described by all witnesses who saw it as very beautiful (ST 293, COX; ST 301, HEIDECKER; ST 123, CRABTREE), and there were no facilities in the area (ST 295). Mr. SHULTZ impressed Mr. COX with his

knowledge of land development (ST 294). Mr. SHULTZ impressed every person he contacted with his ideas and capabilities as to developing Lake Roosevelt property (ST 118, CRABTREE; ST 254, ROUSE; and of course Mrs. HEIDECKER). Mr. SHULTZ wanted to take over this property and form a land development company (ST 296). He moved to Spokane, and did further research into the development of this tract of land (ST 298).

Mrs. HEIDECKER invited Mr. COX and Mr. SHULTZ to her home to discuss the development. At the initial visit on October 12, 1973, Mr. COX introduced Mr. SHULTZ as a land developer from Texas and a lengthy discussion ensued concerning the Lake Roosevelt property (ST 298). Mr. SHULTZ made the presentation and answered Mrs. HEIDECKER'S questions (ST 34-45). In response to her question as to who said what she would get for her investment in the way of stocks, she stated, "Mr. SHULTZ *I imagine.*" On cross-examination, she testified as follows:

> Q. Isn't it a fact . . . that during the time Mr. Cox and Mr. Shultz were together, at your home, that Mr. Shultz did most of the talking?
>
> A. He did a great deal of it, yes.
>
> Q. But, isn't it a fact that he did most of the talking?
>
> A. Yes, when they were together.

Mr. COX' active participation was *the* introduction of Mr. SHULTZ and his description of the 650 acres on Lake Roosevelt (ST 301).

Mrs. HEIDECKER testified that she was told the first meeting that the corporation, later known as the Columbia River Land and Development Company, was in

existence and had purchased this property. However, she admitted having told the investigator from the Securities Division of the Department of Motor Vehicles in April of 1975 that she was told the property was merely *in the process* of being purchased (ST 98). There were no promises or guarantees made by either Mr. COX or Mr. SHULTZ (ST 99). She stated that Mr. COX was excited and enthusiastic and that it appeared *he* believed what Mr. SHULTZ was saying in regard to the development of this property (ST 97).

Mrs. HEIDECKER was favorable, and obviously impressed with Mr. SHULTZ' presentation, for at the close of this first discussion, she signed a document entitled "Joint Venture Agreement" along with Mr. SHULTZ, and gave to Mr. SHULTZ a $20,000.00 check postdated for November 5, 1973 (ST 45). Mr. COX understood this document to be a pre-incorporation agreement, as he had not personally seen it (ST 300; 328). Mrs. HEIDECKER had heard Mr. COX' description of the subject property and was herself familiar with the lake and its potential (ST 301), and was desirous of recouping her $13,000.00 loss resulting from the Mutual Fund investment (ST 302).

Mrs. HEIDECKER intended to sell her Mutual Funds to cover her new investment. In November of 1973, upon learning that they had not sold, she obtained a loan to cover the November 5 check (ST 48). Mrs. HEIDECKER telephoned the Secretary of State in the latter part of February, 1974, and learned that she had been listed as a director of the corporation. She called Mr. COX and he told her that he was unaware of just how Mr. SHULTZ had the company set up, and to contact him. She replied that it probably doesn't matter anyway, and that she wouldn't bother him (ST 310). On March 1, 1974, Mrs.

HEIDECKER loaned Mr. SHULTZ and the Columbia River Land and Development Corporation $2,500.00 (ST 322).

On December 11, 1973, Mr. COX put up $3,000.00 earnest money on the Hunters Creek property, which was a 130-acre parcel on Lake Roosevelt, some 26 miles away from the 650-acre parcel (ST 304-306). The sellers were unable to clear the title and on May 9, 1974, the realtor, United Farm Agency, delivered a $3,000.00 check to Mr. SHULTZ who was to deposit it in Mr. COX' account. This check was made out to Mr. COX and upon receiving this check, Mr. SHULTZ forged Mr. COX' endorsement and attempted to convert it to his own account. Mr. COX had United Farm Agency stop payment on the check and filed an affidavit of forgery with his bank (ST 320). Mr. COX banker phoned Mr. SHULTZ, who was in Texas at the time, and shortly thereafter (in late May or early June 1974), Mr. SHULTZ committed suicide (ST 250). Mr. COX last contacted Mrs. HEIDECKER in August of 1974, at which time she informed him that she was bringing a civil action against him for $20,000.00 (ST 324).

E. *ARGUMENT WHY A REVIEW SHOULD BE ACCEPTED*

(1) It is respectfully submitted that the Supreme Court of the State of Washington should accept review of this case in order to clarify an erroneous statement of law which would have a disastrous effect on the securities business in the State of Washington. The clear import of the Court of Appeals decision, in an effort to follow similar Federal case law relating to the same subject matter, namely paralleling cases considering Federal Rule 10(b)-5 which is similar to R.C.W. 21.10.010, is erroneous. The conclusion by the Court of Appeals is

now a published opinion in the State of Washington and clearly incorrect because the Federal law as set forth in *Ernst and Ernst v. Hochfelder*, 425 U.S. 185, 47 L.Ed. 2d 668, clearly requires a necessity to show scienter, specific intent and at least a wilfulness in order to recover against the alleged perpetrator. For the Court of Appeals to interpret the cases which they cite and then to conclude

> "Therefore, a violation of R.C.W. 21.20.010(2) does not require a specific intent to defraud. *The making of an untrue statement is sufficient.*" (emphasis mine)

is an incorrect interpretation of the law and should not not be allowed to stand in this State. The Court's holding will impose a strict liability on all the securities sales in this State, and would have a disastrous effect on the industry of selling and dealing with securities in Washington. If this interpretation is allowed to stand, especially without clarification and a delineation of just what is required for a violation of the securities statutes in our state, the broad-reaching effect and the disastrous consequences to all securities salesmen in the State of Washington would occur. Public policy alone required that the statutes be clarified and the interpretation by a Court of our State be made to conform to the true holding of the Federal law, if in fact our principles of law in the State of Washington provide that we may in interpreting our statutes, use similar Federal law relating to the same subject.

(2) *Argument in Support of Assignment of Error No. 2 and No. 3*

The Court erred in giving Instruction No. 3 in that the said Instruction failed to apprise the jury of the essential element of specific intent to deprive the owner at the time of the taking, to-wit:

Instruction No. 3

Before you can find the defendant guilty of the crime of GRAND LARCENY, as charged in Count I of the Information, you must find from the evidence beyond a reasonable doubt all of the following elements:

1. That the said ROBERT SHULTZ, in the County of Spokane, State of Washington, on or about between October 12, 1973, and April 18, 1974, then and there being, did then and there *wilfully and unlawfully, with intent to deprive and defraud* the owner thereof, obtain from ANNABELLE G. HEIDECKER a sum of money in excess of $75.00 in lawful money of the United States, the property of and belonging to the said ANNABELLE G. HEIDECKER;

2. That the said ROBERT SHULTZ obtained such money by color and aid of false and fraudulent representation and pretenses;

3. That such representations were false, the said ROBERT SHULTZ and defendant, DONALD COX, knowing the same to be false;

4. That said ANNABELLE G. HEIDECKER believed the said representation, relied thereon, and was deceived;

5. That the said defendant, DONALD COX, in the County of Spokane, State of Washington, on or about between October 12, 1973, and April 19, 1974, then and there being, did then and there wilfully and unlawfully aid, abet, counsel and encourage ROBERT SHULTZ in the commission of the crime of GRAND LARCENY as aforesaid.

If you find that any of the foregoing elements have not been established by the evidence in this case beyond a reasonable doubt, you must acquit the defendant of the crime of GRAND LARCENY, but if you find all of these elements have been

established by the evidence in this case beyond a reasonable doubt, you must find the defendant guilty of GRAND LARCENY.

The essence of the argument herein is that the aforesaid instruction wholly failed to apprise the jury of the essential element of the crime of larceny of specific intent to steal at the time of the appropriation of the money of Mrs. HEIDECKER. Furthermore, the said instruction along with the remainder of the Court's instructions, failed to set forth the distinction between Larceny and Embezzlement, which distinction, it is submitted, was a very real and pervasive issue at the trial herein and, because Mr. COX believed throughout the HEIDECKER transaction that Mr. SHULTZ had a legitimate aim to develop the Lake Roosevelt property, was essentially the bedrock of his theory of defense.

The following language from the case of *State v. Johnson*, 56 Wn.2d 700, 355 P.2d 13 (1960), sets forth the elements of specific intent as well as the distinction between Larceny and Embezzlement. It stated at page 704:

> "The chief distinction between the two crimes lies in the manner of acquiring possession of the property. In embezzlement, the property comes lawfully into the possession of the taker and is fraudulently or unlawfully appropriated by him; in larceny, there is a trespass in the unlawful taking of the property. Embezzlement contains no ingredients of trespass, which is essential to constitute the offense of larceny. Moreover, embezzlement does not imply a criminal intent at the time of the original receipt of the property, whereas in larceny the criminal intent must exist at the time of the taking."

In *State v. Smith*, 2 Wn.2d 118, 98 P.2d 647 (1939), defendant was charged and convicted of larceny of monies

over which he had lawful control by virtue of his management position in the victimized company. The Court reversed the conviction, stating at page 122:

> "In order to constitute larceny, there must have been, first, an unlawful acquisition of possession of the property with the intention at the time of taking it into possession to convert it to the taker's use...."

See also, *State v. Konop*, 62 Wn.2d 715, 719, 384 P.2d 385 (1963), wherein larceny is defined as the unlawful obtaining of another's property, with a criminal intent at the time of its acquisition.

Instruction No. 3, defining the elements of Grand Larceny, sets a time frame of "on or about between October 12, 1973, and April 18, 1974." This instruction wholly fails to set forth the essential element of specific intent to deprive at the actual time of taking possession. The evidence reveals that Mr. COX and Mrs. SHULTZ met with Mrs. HEIDECKER on October 12, 1973. Mrs. HEIDECKER delivered her check, payable to Columbia River and Land Development Company, to Mr. SHULTZ, alone (ST 97), which check was covered and deposited by Mr. SHULTZ in mid-November of 1973. Mr. SHULTZ endorsed and deposited this check in his own account (ST 94). There is no proof indicating that Mr. SHULTZ, at the time he received this check, possessed the criminal intent to convert it to his own use. There is even less proof to the effect that Mr. COX was aware of such intent, if any there was, at this time. Therefore, the distinction between larceny and embezzlement was a paramount issue. In light of this pattern, the Court's instruction was prejudicially erroneous, for it failed to set forth the law pervading the facts of this case. The instruction allowed the jury to determine that criminal intent to deprive Mrs.

HEIDECKER of her property could be found any time between October 12, 1973, and April 18, 1974, to sustain a conviction regardless of the state of Mr. SHULTZ' intent at the actual time of the taking of her property.

Moreover, this instruction erroneously precluded defendant from properly and fully arguing his theory of defense to the jury. In this regard, it is submitted that the law is clear in its requirement that the jury be fully and fairly informed as to the legal issues of the case.

Another consideration in this regard is that if the State's instruction as approved by the trial court and the Court of Appeals is correct, a person could be charged with larceny but may be convicted of either larceny or embezzlement. This appears to be totally incorrect and unfair, but entirely consistent with the trial court's instruction. First of all, there's an actual and historical difference between taking and embezzling, and prior cases are correct when they hold that to charge the defendant with one thing and then to convict him of another, denies him of his right to know the crime charged. *State v. Thompson,* 68 Wn.2d 536, 413 P.2d 951 (1966); *State v. Smith,* 2 Wn.2d 118, 98 P.2d 647 (1939). Furthermore, it is clear that common law larceny by taking and even common law Grand Larceny by false pretenses both require an intent to deprive at the time of the obtaining of the property, and therefore, both bear approximately the same relationship to common law embezzlement.

Argument Against Court's Instruction No. 5

The Court erred in giving Instruction No. 5 in that the said instruction incorrectly states the essential elements of the offense charged in Count II insofar as it fails to instruct as to the requirement of specific criminal intent to defraud and deprive, to-wit:

"Before you can find the defendant guilty of the crime of UNLAWFUL SALE OF SECURITIES, as charged in Count II of the Information, you must find from the evidence beyond a reasonable doubt all of the following elements:

1. That the said ROBERT SHULTZ, in the County of Spokane, State of Washington, on or about between October 12, 1973, and April 19, 1974, then and there being, did then and there wilfully and unlawfully, either

   a. Employ any device, scheme or artifice to defraud, or

   b. Make any untrue statement of material fact or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading, or

   c. Engage in any act, practice or course of business which operated or would operate as a fraud or deceit upon any person;

2. That said act or acts were done in connection with the offer or the sale of securities to ANNABELLE G. HEIDECKER;

3. That the said defendant, DONALD COX, in the County of Spokane, State of Washington, on or about between October 12, 1973, and April 19, 1974, then and there wilfully and unlawfully aid, abet, counsel and encourage ROBERT SHULTZ in the commission of the crime of UNLAWFUL SALE OF SECURITIES as aforesaid.

If the State has failed to establish by the evidence in this case, beyond a reasonable doubt, any one of the foregoing elements, then you must acquit the defendant, DONALD COX, of the crime of UNLAWFUL SALE OF SECURITIES, as charged in Count II of the Information.

With respect to elements 1(a), 1(b) and 1(c), these are alternatives, and it is only necessary for the

> State to prove either 1(a), 1(b) or 1(c); however, it is necessary that all of you agree either to 1(a), 1(b), or 1(c) in order to return a verdict of guilty.
>
> On the other hand, if the State has established by the evidence beyond a reasonable doubt all of the foregoing elements, it will be your duty to find the defendant, DONALD COX, guilty of the crime of UNLAWFUL SALE OF SECURITIES.

The Court instructed in the language of the statute, however, nowhere in the instruction is the requirement of a criminal intent to defraud and deprive set forth. This being an alleged criminal, as opposed to a civil, securities violation, this criminal intent is an essential element of the offense charged. The recent case of *State v. Hynds,* 84 Wn.2d 657, 529 P.2d 829 (1974) was cited to the trial court and provides the authority for the argument herein at page 662 as follows:

> "Defendants correctly point out that a . . . violation of R.C.W. 21.20.010 without a violation of R.C.W. 21.20.400 as well does not necessarily constitute a crime. A violation must be 'wilful' before criminal penalties attach.
>
> Federal decisions have emphasized this distinction between civil and criminal violations and have held that in a securities fraud case, knowledge of the falsity of the representations and specific intent to defraud must be proven." *Walters v. United States,* 256 F.2d 840, 842-43 (9th Cir. 1958); *Kistner v. United States,* 332 F.2d 978 (8th Cir. 1964); *Windsor v. United States,* 384 F.2d 535, 536-37 (9th Cir. 1967).

Argument in Support of Defendant's Proposed Instructions No. 7 and No. 9

The Court of Appeals incorrectly determined the position of the Appellant herein and failed to give Appellant's proposed Instructions No. 7 and No. 9 which correctly state the necessary elements of the crime charged.

Grand Larceny Instruction

> In connection with the preceding instruction, you are instructed that the defendant herein, DONALD COX, is charged with unlawful aiding and abetting to the crime of Grand Larceny, allegedly committed by Robert Shultz. It therefore must be proven beyond a reasonable doubt that the defendant herein, DONALD COX, knowingly aided and abetted, counseled and encouraged Robert Shultz in the alleged commission of the offense of Grand Larceny.
>
> In other words, it must be proven beyond a reasonable doubt that the defendant herein knew that statements made by Robert Shultz were untrue and were wilfully and intentionally made by Robert Shultz for the purpose of and with the specific intent to defraud and permanently deprive Annabelle Heidecker of her property and that the defendant herein knew that at the actual time Robert Shultz received and took the property of Annabelle Heidecker, he did so with the specific intent to defraud and permanently deprive her of the said property. It must be proven beyond a reasonable doubt that the defendant herein aided, abetted, counseled and encouraged Robert Shultz in the intentional making of the alleged receiving and taking of the property of Annabelle Heidecker with the specific intent to defraud and permanently deprive her of the said property at the time of the alleged taking.

Securities Instruction
(Proposed Instruction No. 9)

> In connection with the preceding instruction, you are instructed that, the defendant herein, Donald Cox, is charged with unlawful aiding and abetting to the crime of Unlawful Sale of Securities, allegedly committed by Robert Shultz. Therefore,

it must be proven beyond a reasonable doubt that the defendant herein, Donald Cox, knowingly aided and abetted, encouraged and counseled Robert Shultz in the alleged commission of the offense.

In other words, it must be proven beyond a reasonable doubt that defendant herein knew that statements made by Robert Shultz were untrue and were wilfully and intentionally made by Robert Shultz with specific intent to deceive and defraud Annabelle Heidecker of her property.

These two instructions would have obviated the problem which the defective instructions which the Court gave magnified. The main difference between the Court's in-instructions and the defendant's proposed instructions is the fact that Instructions No. 7 and No. 9 stated that the intent to deprive must be *at the time of the taking.* The Court of Appeals goes on a tirade discussing wilfullness and criminal intent, and missed the entire import of defendant's argument. The alleged offense in this case took place somewhere between October 12, 1973, and April 18, 1974 — a period of over *seven months.* Nowhere is the jury informed in the instructions that the intent that is necessary (arguendo, specific intent) to deprive the owner of property, *at the time that it is taken.* In this case, a check was given to Mr. Shultz by Mrs. Heidecker, post-dated. No money was given to Mr. Cox, and in fact, at the time of the actual taking, if in fact we can say there was a taking by Mr. Shultz, there certainly was no intent on the part of Mr. Cox at the time he received any money. He had no intention or knowledge of taking anything from Mrs. Heidecker and the record is barren from any reading or construction that he knew that the money came from Mrs. Heidecker.

F. *CONCLUSION*

The Supreme Court should accept review of this case and clarify erroneous statements of law as purported by the Court of Appeals of the State of Washington. In so doing, justice and fairness require a new trial consistent with the Supreme Court's opinion that it takes more than "the making of an untrue statement" to satisfy a conviction under R.C.W. 21.20.010(2), and that for a conviction of the crime of Grand Larceny you must have the intent to take at the time the property is actually received for a conviction.

Respectfully submitted,

MARK E. VOVOS

APPENDIX D

THE SUPREME COURT
STATE OF WASHINGTON
OLYMPIA

January 20, 1978

Vovos & Voermans
Mr. Mark E. Vovos
North 721 Jefferson Street
Spokane, Washington 99201

Honorable Donald Brockett
Prosecuting Attorney
Mr. Fred Caruso, Deputy
County-City Public Safety Building
Spokane, Washington 99201

Counsel:

Re: Supreme Court No. 45085 — State v. Cox
Court of Appeals No. 1873-III

Following consideration of the above entitled Petition for Review on January 20, 1978, the following notation order was entered on page 14, Vol. 1, of the petition for review docket:

"DENIED"

/s/ Charles T. Wright
Chief Justice

Very truly yours,

JOHN J. CHAMPAGNE
Clerk

JJC:aje

cc: Honorable Leonard J. Nelson, III, Clerk
Division III, Court of Appeals

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 77-1593

DONALD G. COX,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

DONALD C. BROCKETT
Spokane County Prosecuting Attorney

FRED J. CARUSO
Deputy Prosecuting Attorney

County-City Public Safety Building
West 1100 Mallon Avenue
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MISCELLANEOUS

The Respondent, State of Washington, by its attorneys, Donald C. Brockett, Prosecuting Attorney for Spokane County and Deputy Prosecuting Attorney, Fred J. Caruso, submits the following Brief in Opposition to the Petition for Writ of Certiorari.

OPINION BELOW

Respondent accepts Petitioner's Statement of the Opinion Below.

JURISDICTION

Petitioner is invoking jurisdiction under 28 USC §1257(3) to review his convictions in this case of Count I, Aiding and Abetting Grand Larceny (R.C.W. 9.54.010 (2)), and Count II, Aiding and Abetting Unlawful Sale of Securities (R.C.W 21.20.010). However, the Grand Larceny conviction under Count I does not involve a federal question under 28 USC §1257(3) and Petitioner does not so claim. Therefore, it is respectfully submitted that this court should not accept jurisidction to review Petitioner's conviction of Count I, and for the reasons set forth below should also not review Petitioner's conviction of Count II.

QUESTIONS PRESENTED

Petitioner's first four questions presented involve what respondent understands to be one basic issue; that is: whether or not the Washington Court of Appeals decision in this case affirming

Petitioner's conviction of Count II, Aiding and Abetting Unlawful Sale of Securities (R.C.W 21.20.010) is in conflict with this court's decision in Ernst & Ernst v. Hochfelder, 425 US 185, 47 L.Ed.2d 668, 96 S.Ct. 1375 (1976).

Petitioner's 5th and 6th questions presented concern Count I and do not involve a federal question.

STATUTORY AND REGULATORY PROVISIONS

Respondent accepts Petitioner's Statement of the statutory and regulatory provisions but cites the following statutory and regulatory provisions as also being involved in this case:

15 USC §78ff (a) provides in pertinent part:

> "Any person who wilfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, . . . shall upon conviction be fined . . . or imprisoned . . ."

The corresponding law in Washington is found in R.C.W. 21.20.400 which provides in pertinent part:

> "Any person who wilfully violates any provision of this chapter . . . or wilfully violates any rule or order under

this chapter . . . shall upon conviction be fined . . . or imprisoned . . ."

The Washington aiding and abetting statute applicable to this case is RCW 9.01.030 and provides as follows:

> "Principal defined. Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. . . ."

STATEMENT OF THE CASE

With respect to Count I, Aiding and Abetting Grant Larceny (R.C.W. 9.54.010 (2)), the trial court, contrary to Petitioner's assertion, did instruct the jury concerning the required intent to deprive and defraud. Element Instruction No. 3 (Appendix A) specifically required a finding of intent to deprive and defraud on the part of the principal offender, Shultz, and that Petitioner Cox "wilfully and unlawfully" aided and abetted Shultz. Instruction No. 8 (Appendix B) defined "wilfully" as intentionally and purposely.

Instructions Nos. 18 and 19 (Appendix C) defined intent. Instruction No. 15 (Appendix D) expressly defined the term "specific intent" regarding Grand Larceny. Instruction No. 16 (Appendix E) defined aiding and abetting in the language of the statute, R.C.W. 9.01.030, and stated that the acts done must be with an "intent to aid, abet or encourage the commission of the crime."

Moreover, the Washington Court of Appeals in this case did not find a "deficiency in the Grand Larceny instruction" that was "cured by other jury directives" as asserted by Petitioner. On the contrary, the opinion held that the instructions, as a whole, adequately covered the mental element of the charge of Aiding and Abetting Grand Larceny. State v. Cox, 17 Wn. App. 896, 900, 566 P.2d 935, 938 (1977).

With respect to Count II, Aiding and Abetting Unlawful Sale of Securities (R.C.W 21.20.010), the trial court did instruct on the necessary mental state required. Element Instruction No. 5 (Appendix F) required that the principal offender Shultz "wilfully" committed the unlawful sale of securities and that Petitioner Cox "wilfully" aided and abetted Shultz.

The decision below affirming Petitioner's conviction of Count II, clearly held that the instructions requiring the Petitioner's acts be "wilful" adequately covered the mental state necessary for a criminal violation of the Washington State Securities Act. State v. Cox, 17 Wn. App. 896, 903-4, 566 P.2d 935, 940 (1977). Respondent submits that the decision in this respect is not contrary to this court's opinion in Ernst & Ernst v.

Hochfelder, 425 US 185, 47 L.Ed.2nd 668, 96 S.Ct. 1375 (1976).

REASONS FOR DENYING THE WRIT

I. NO FEDERAL QUESTION IS INVOLVED AS TO COUNT I, AIDING AND ABETTING GRAND LARCENY (R.C.W. 9.54.020(2)) AND PETITIONER'S WRIT SHOULD BE DISMISSED FOR WANT OF JURISDICTION CONCERNING THIS CONVICTION.

With respect to Petitioner's conviction of Count I, Aiding and Abetting Grand Larceny (R.C.W. 9.54.010(2)) Petitioner raises no federal question.

In his statement of the case, Petitioner's counsel, who was not counsel at trial, states that the trial court refused to give Petitioner's proposed instruction requiring the jury to find a specific intent to deprive and defraud at the time of the taking and that the Court of Appeals held that this "deficiency" was "cured" by other instructions. However it is clear that the trial court's instructions more than adequately covered this element of the offense of Grand Larceny.

Instruction No. 3 (Appendix A) set out the elements of the offense, requiring that the jury find that the principal Shultz obtained the money with the "intent to deprive and defraud" and that Petitioner Cox both "wilfully and unlawfully" aided Shultz. It is also significant to note that this instruction

further required that Shultz obtained the money by false representations and that both Shultz and Cox knew the representations were false.

Instruction No. 8 (Appendix B) defined "wilfully" as intentionally and purposely. Instructions Nos. 18 and 19 (Appendix C) defined intent. Instruction No. 15 (Appendix D) defined "specific intent."

Thus, a "specific intent" instruction was given in this case and the other instructions on intent more than adequately covered the required mental state. In fact, the instructions on intent were quite favorable to Petitioner and went beyond that which the court was required to give, because under Washington law the instruction defining "wilfully" would have been sufficient. State v. Stewart, 73 Wn.2d 701, 704, 440 P.2d 815 817 (1968); State v. Mello, 3 Wn. App. 555, 556-557, 477 P.2d 42, 43 (1970), reversed on other grounds, 79 Wn.2d 279, 484 P.2d 910 (1971); State v. Martin, 14 Wn. App. 74, 77-78, 538 P.2d 873, 876 (1975).

In addition Instruction No. 16 (Appendix E) specifically told the jury that the Petitioner's actions must have been done with an "intent" to aid or abet. The mental state required under this instruction is simply that Petitioner had knowledge of the wrongful purpose of the principal. State v. Gibson, 79 Wn.2d 856, 490 P.2d 874 (1971). Respondent contends that there is no question but that the intent instructions given covered this point. Indeed, as noted by the Court of Appeals' decision in this case, the Petitioner's contention in this respect was simply "not

well taken." State v. Cox, 17 Wn. App. 896, 900, 566 P.2d 935, 938 (1977).

Petitioner clearly recognizes that no federal question is involved concerning the conviction under Count I, and the only reason he assigns for granting the writ in this respect is that where a federal question is "mixed with non-federal questions" the court should decide the entire case. No authority is cited for this proposition. Moreover, this is not a case where one count involves mixed questions, but is a case involving two separate counts, with the count in question having absolutely no federal question, mixed or otherwise.

Thus, it is respondent's contention that no federal question having been raised at any stage with respect to the conviction under Count I, this court should deny the writ for want of jurisdiction to even consider Count I.

II. THE WRIT SHOULD BE DENIED AS TO COUNT II BECAUSE THE PETITIONER DOES NOT CHALLENGE THAT CONVICTION UNDER SUB-SECTIONS (1) AND (3) OF R.C.W. 21.20.010.

In Count II, Petitioner was charged with wilfully and unlawfully aiding and abetting a crime that was committed by at least three alternative methods. Under the test set forth in State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976), it is clear that the unlawful sale of securities prohibited by R.C.W. 21.20.010 defines but one crime that may be committed by three different means, which are set out in

subsections (1), (2) and (3) of the statute. Paraphrasing the statute, these subsections essentially provide as follows: (1) employ a scheme to defraud; (2) make a false statement or fail to make a material statement; or (3) engage in a course of business which operates as a fraud.

Element Instruction No. 5 (Appendix F) told the jury that the principal offender, Shultz, must have "wilfully" committed the crime in one of the three means set out and that the Petitioner Cox "wilfully" aided and abetted Shultz. This instruction further told the jury that the different means were simply alternatives and that one had to be proved, but that the jury must be unanimous as to any of the three alternatives. It should be noted that since State v. Arndt, supra, unanimity as to the mode of commission is no longer required in Washington, as long as the jury is unanimous that the crime was committed.

On appeal, Petitioner did not contend that subsections (1) and (3) were deficient in requiring an intent to defraud. This is so because inherent in the very language of those subsections is the requirement of an intent to defraud; that is, if one "wilfully," which means intentionally, employees a scheme to defraud (subsection 1) or "wilfully" engages in a fraudulent course of business (subsection 3), then he necessarily has an intent to defraud. It is only with respect to subsection (2) that Petitioner complains that an intent to defraud instruction should have been given. In this respect the Court of Appeals stated at 17 Wn. App. 566 P.2d 938:

> The defendant contends that the court's instruction No. 5

> is inadequate on the basis that it fails to require the necessary intent to defraud and deprive. The first portion of this instruction specified the activities which constitute unlawful sale of securities and is based upon statutory language. Subsections (1.) and (3.) specifically require an intent to defraud or deceive, whereas subsection (2.) does not. The defendant's proposed instruction would add an intent to defraud or deprive as an element under subsection (2.).

Hence, Petitioner is not attacking the intent requirements of the Count II conviction under the alternatives of subsection (1) and subsection (3) of R.C.M. 21.20.010. There was more than substantial evidence to support the Count II conviction under those alternatives. In effect, Petitioner is asking the court to speculate as to what alternative means of committing the offense the jury found.

But even assuming arguendo that the jury based the Count II conviction on subsection (2), they must necessarily have found a specific intent to defraud. The subsection (2) alternative involved, in part, the making of a false statement or false representation. Count I specifically involved Grand Larceny by "False Representations" and the instructions expressly required an intent to deprive and defraud and that Cox wilfully aided and abetted knowing the representations were false. Since the jury found that Cox was guilty of Count I, then it follows that the jury would automatically find Petitioner guilty of Count II under subsection

(2), upon the additional finding that the fraud was committed "in connection with the offer or sale of securities."

For these reasons, it is respectfully submitted that Petitioner's writ to review Count II should be denied.

III THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DECISION IN THIS CASE IS NOT CONTRARY TO ERNST & ERNST v. HOCHFELDER, SUPRA.

While the instant case was pending appeal, Ernst & Ernst v. Hochfelder, 425 US 185, 47 L.Ed.2d 668, 96 S.Ct. 1375 (1976) was decided, and held that negligent conduct alone will not establish liability in a private action for damages under Rule 10b-5 of the Securities and Exchange Commission and that some element of "scienter" is necessary.

Petitioner contends that the decision in the instant case is in direct conflict with Hochfelder. However, assuming the applicability of Hochfelder to the Petitioner's Count II conviction, it is respectfully submitted that there is no conflict.

In determining that some element of "scienter" is required, the majority opinion in Hochfelder emphasized the language of section 10(b) of the 1934 Securities Act, 15 USC Section 78j(b), concerning the use of "any manipulative or deceptive device or contrivance." In this respect it was stated at 425 US 197 that these words:

". . . strongly suggest
that section 10(b) was intended

to proscribe knowing or intentional misconduct."

It is further stated at 425 US 199 that the term "manipulative" is particularly significant because it "connotes intentional or wilful conduct designed to deceive. . ." The majority opinion concluded in part at 425 US 214 that the language of section 10(b) comports with ". . . the commonly understood terminology of intentional wrongdoing . . ."

Thus, the scienter required by Hochfelder involves "wilfull" or "knowing or intentional misconduct." That this is the "scienter" requirement of Hochfelder is seen by the recent application of Hochfelder in McLean v. Alexander, 420 F.Supp. 1057, 1080 (D. Delaware, 1976), wherein it was said:

> "However, Hochfelder does serve as a starting point for analysis. It defined 'scienter' as the 'mental state embracing intent to deceive, manipulate, or defraud.'[116] Further, it stated 'that § 10(b) was intended to proscribe knowing or intentional misconduct.'[117] It necessarily follows that scienter for purposes of imposition of civil liability under section 10(b) and Rule 10b-5 encompasses knowing or intentional misconduct. If the result were otherwise, Section 10(b) and Rule 10b-5 would be more restrictive in substantive scope than the substantive law of fraud." (Footnotes omitted.)

Thus, in private actions under section 10(b) or rule 10b-5, mere negligence is insufficient and some element of "scienter" is required which involves wilfull, knowing or intentional misconduct.

It should be noted that, contrary to Petitioner's assertion, in private actions involving securities violations, the State of Washington is in accord with this court's decision in Hochfelder. See Ludwig v. Mutual Real Estate Investors, 18 Wn. App. 33, 567 P.2d 658 (1977).

The decision in Hochfelder sets out essentially the same rule that is applied in criminal violations of the Securities Act of 1934, 15 USC § 78ff(a) which provides in relevant part:

> "Any person who wilfully violates any provision of this chapter . . . or wilfully violates any rule or order under this chapter . . . shall upon conviction be fined . . . or imprisoned . . ."

Criminal violations under this provision will not be supported by evidence of negligence only, but require "wilfull" or "knowing" conduct. United States v. Dixon, 536 F.2d 1388, 1396-1397 (2nd Cir. 1976); United States v. Natelli, 527 F.2d 311, 322 (2nd Cir. 1975), cert. denied, 425 US 934, 96 S.Ct. 1663, 48 L.Ed.2d 175 (1976); United States v. Schwartz, 464 F.2d 499, 509 (2nd Cir. 1972), cert. denied, 409 US 1009, 93 S.Ct. 443, 34 L.Ed.2d 302 (1972); United States v. Peltz, 433 F.2d 48, 55 (2nd Cir. 1970), cert. denied 401 US 955, 91 S.Ct. 974, 28 L.Ed.2d 238 (1971); United States

v. Simon, 425 F.2d 796,809 (2nd Cir. 1969), cert. denied, 397 US 1006, 90 S.Ct. 1235, 25 L.Ed.2d 420 (1970).

In United States v. Dixon, supra, it was stated at 536 F.2d 1396-1397:

> "The trial judge apparently recognized all this and defined 'knowingly' as used in the indictment to be substantially synonymous with 'wilfully'. Thus he told the jury that the standard of proof respecting state of mind was the same for both the proxy and 10-K counts; that 'an act is done knowingly if done voluntarily and intentionally and not because of a mistake or accident or other innocent reason'; that 'an act is done willfully if done intentionally and deliberately'; and that the 'word "knowingly" means that the defendant must be aware of what he was doing and what he was not doing; the word "willfully" under [the proxy and 10-K counts] means that the defendant acted deliberately and intentionally and his acts, statements or omissions were not the result of innocent mistake, negligence or inadvertence or other innocent conduct.' Such an instruction accords with the standards of the first clause of § 32(a) insofar as it simply collapses 'knowingly' into 'willfully,' and, as we have noted, it was the first clause

that set the standard to be applied."

See also Herlands, Criminal Aspects of the Securities Exchange Act of 1934, 21 Virginia Law Review 139, 148-149 (1934); annot. 20 A.L.R.Fed. 227 (1974).

It is respectfully submitted, therefore, that Hochfelder did not change the required mental state for criminal violations of the Securities Act of 1934 or Rule 10b-5. The parameters of the mental state required for such criminal violations have been well established prior to Hochfelder. Rather, Hochfelder simply raised the mental state required in private actions to essentially the same mental state that had already been required to prove a criminal violation. In both instances the mental state encompasses wilful, knowing or intentional misconduct. Thus, there is no need, as Petitioner asserts, that the principle of Hochfelder "will surely carry over into criminal cases." The requirement of scienter in criminal violations has already been well established.

With respect to criminal violations of the securities laws of the State of Washington, the acts complained of also must be "wilfull." R.C.W 21.20.400 provides in pertinent part:

> "Any person who wilfully violates any provision of this chapter . . . or wilfully violates any rule or order under this chapter . . . shall upon conviction be fined . . . or imprisoned. . ."

That this statute proscribes wilfull, knowing or intentional conduct is illustrated by State v. Hynds, 84 Wn.2d 657, 664, 529 P.2d 829, (1974), wherein it is stated in approving intent instructions similar to those given in this case:

> "These instructions do not use the precise language of the federal decisions; however, they tell the jury that the violation of the Securities Act must be wilfull, that the untrue statements must be intentionally made, and that the defendant had to know in his own mind that his untrue statements would not occur, or that the statements were made recklessly without knowledge of facts and with intent to deceive.

Moreover, in Washington if an act is done "wilfully," then this is sufficient for those crimes involving a particular intent.

In State v. Stewart, 73 Wn.2d 701, 440 P.2d 815 (1968), the court instructed the jury that the assault must be wilfull. On appeal, it was argued that second degree assault was a specific intent crime and the court erred in giving only an instruction on "wilfully" and erred in refusing a proposed instruction which stated that the jury must find "specific intent on the part of the defendant." In rejecting this contention, it was said at 73 Wn.2d 704, 440 P.2d 817:

> "The basis of defendant's objection to instruction No. 6 is that it withdraws from the jury's consideration a necessary element of the crime of

second degree assault: specific intent. We do not agree.

[1] The crucial word in the statute and in the instruction is 'wilfully.' Even appellate counsel (who did not try this case in the superior court), admits in his brief that 'had this instruction (No. 6, supra) defined "wilfully" it may have been proper. . . .'

Further definition was not necessary. In State v. Spino, 61 Wn.2d 246, 377 P.2d 868, (1963), this court said:

> 'The term "wilfully"is not ambiguous. As used in criminal statutes, it means intentionally and designedly.'

Prior decisions of this court support the definition set forth in Spino, supra. In State v. Vanderveer, 115 Wash. 184, 196 Pac. 650 (1921), it is stated that 'An act done willfully is done intentionally and designedly.' (italics ours.) In State v. Evans, 32 Wn.2d 278, 201 P.2d 513 (1949) (a second degree assault case), the court pointed out that 'A wilful act is one done intentionally, not accidentally.'

Instruction No. 6 did not withdraw specific intent as a necessary element of the crime of second degree assault. Requested instruction No. 1 would

add nothing to the instruction given and it was not error to refuse it."

In State v. Mello, 3 Wn.App. 555, 477 P.2d 42 (1970), rev'd on other grounds, 79 Wn.2d 279, 484 P.2d 910 (1971), it was again held that an instruction defining "wilfully" was sufficient in a specific intent crime. It was there said at 3 Wn.App. 556-557, 477 P.2d 43:

"The matter of requisite intent for the crime seems to have been decided in State v. Stewart, 73 Wn.2d 701, 440 P.2d 815 (1968). In that case, the jury was instructed that they could find the defendant guilty if they found acts sufficient to constitute the crime that were 'wilfully' done. The Supreme Court found that the word 'willful' sufficiently defined the required intent. Thus, we feel that the instructions here, which both require the acts to be done willfully[1] and define willful[2] are sufficient to put properly before the jury this element of the crime. See State v. Travis, 1 Wn. App. 971, 465 P.2d 209 (1970); State v. Turner, 78 W.D.2d 276, 474 P.2d 91 (1970)." (Footnotes omitted)

In State v. Martin, 14 Wn.App. 74, 538 P.2d 873 (1975), it was said at 14 Wn.App. 77-78, 538 P.2d 876:

"The defendant next contends it was error to refuse his proposed instruction which would have informed the jury that the State was

required to prove a 'specific criminal intent on the part of the defendant,' requiring the State to show that 'the defendant knowingly did an act which the law forbids, purposely intending to violate the law.' The court did instruct the jury that every person who willfully assaults another with a weapon or thing likely to produce bodily harm is guilty of assault in the second degree, and that the word 'wilfully' means 'intentionally and purposely and not accidentally.' The instructions when read as a whole clearly required the State to prove that the defendant intended to commit the act. It was not necessary that the term 'specific' be used to describe the intent which must be proven to have been fixed in the mind of the defendant. A similar instruction was proposed in State v. Stewart, 73 Wn.2d 701, 440 P.2d 815 (1968). It was held that use of the term 'specific' in an instruction to the jury was unnecessary, the court stating that it was sufficient if an instruction is given defining the term 'willfully' as meaning 'intentionally and not accidentally.' The defendant could argue his theory of the case, and it was not error to refuse the proposed instruction." (Emphasis added)

Thus, it is clear that the trial court did not err in giving its instructions defining wilfully and further, it did not err in refusing to give appellant's proposed

instruction on specific intent. The authorities also do not find any error in the court's failing to use the term "specific intent."

See also, State v. Hynds, supra, which specifically involves securities violations.

In the present case, the element instruction for Count II, Instruction No. 5 (Appendix F) clearly required that the principal offender Shultz "wilfully and unlawfully" committed the securities violation, and that Petitioner Cox "wilfully and unlawfully" aided and abetted. These terms were defined in Instruction No. 8 (Appendix B) respectively as "intentionally and purposely" and "without and beyond the authority of the law."

The mental state required by all the authorities, both federal and state, was met. The standard employed further meets the test of Hochfelder -- wilfull, knowing or intentional misconduct.

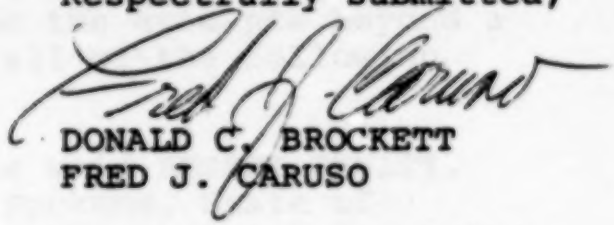
While the Court of Appeals' decision in this case did discuss cases which may be changed by Hochfelder, the decision was also based on the fact that the test of wilful and intentional conduct was met. State v. Cox, 17 Wn. App. 896, 903-4, 566 P.2d 935, 940 (1977).

Therefore, it is respectfully submitted that the Petitioner's writ to review Count II should be denied as the test of Hochfelder was complied with in this case.

CONCLUSION

For the above reasons, respondent respectfully requests that the Petitioner's Writ of Certiorari be denied.

Respectfully submitted,



DONALD C. BROCKETT
FRED J. CARUSO

Counsel for Respondent

APPENDIX A

INSTRUCTION NO. 3

Before you can find the defendant guilty of the crime of GRAND LARCENY, as charged in Count I of the Information, you must find from the evidence beyond a reasonable doubt all of the following elements:

1. That the said ROBERT SHULTZ, in the County of Spokane, State of Washington, on or about between October 12, 1973, and April 18, 1974, then and there being, did then and there wilfully and unlawfully, with intent to deprive and defraud the owner thereof, obtain from ANNABELLE G. HEIDECKER a sum of money in excess of $75.00 in lawful money of the United States, the property of and belonging to the said ANNABELLE G. HEIDECKER;

2. That the said ROBERT SHULTZ obtained such money by color and aid of false and fraudulent representation and pretenses;

3. That such representations were false, the said ROBERT SHULTZ and defendant, DONALD COX, knowing the same to be false;

4. That said ANNABELLE G. HEIDECKER believed said representation, relied thereon, and was deceived;

5. That the said defendant, DONALD COX, in the County of Spokane, State of Washington, on or about between October 12, 1973 and April 19, 1974,

then and there being, did then and there wilfully and unlawfully aid, abet, counsel and encourage ROBERT SHULTZ in the commission of the crime of GRAND LARCENY as aforesaid.

If you find that any of the foregoing elements have not been established by the evidence in this case beyond a reasonable doubt, you must acquit the defendant of the crime of GRAND LARCENY, but if you find all of these elements have been established by the evidence in this case beyond a reasonable doubt, you must find the defendant guilty of GRAND LARCENY.

APPENDIX B

INSTRUCTION NO. 8

The term "unlawfully" as used in the Information in this case means without and beyond the authority of the law.

"Wilfully" as used in this case means intentionally and purposely.

APPENDIX C

INSTRUCTION NO. 18

The intent with which an act is done is a mental process and as such generally remains hidden within the mind where it was conceived. It is rarely, if ever, susceptible of proof by direct evidence, but must be inferred or gathered, if at all, from the outward manifestations and the words and acts of the party entertaining it.

INSTRUCTION NO. 19

The law presumes that every man intends the natural and probable consequences of his own acts. Where it takes a particular intent to constitute a crime that intent must be proved to the satisfaction of the jury. It does not require direct or positive proof but the circumstances must be such as would authorize the jury to infer the intent with which the act was done.

APPENDIX D

INSTRUCTION NO. 15

You are instructed that the term "specific intent" as it is used in these instructions, in connection with the offense of Grand Larceny, means the specific intent in the mind of the person taking property, at the actual time of the taking, to defraud and thereby permanently deprive the rightful owner of his or her property.

APPENDIX E

INSTRUCTION NO. 16

Under the laws of this State every person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission, and whether present or absent, and every person who directly or indirectly counsels, encourages, induces or otherwise procures another person to commit a crime is a principal, and shall be proceeded against and punished as such.

In this action, the aiding and abetting or encouragement which will render one a principal may be by acts or words, but it must, to create guilt, be done with an intent to aid, abet or encourage the commission of the crime. There must be some form of overt act, the doing of something that either directly or indirectly contributes to the criminal act, some form of demonstration or expression of affirmative action and not merely approval or acquiescence.

Where two or more persons engage in a common criminal act, and all are present at the scene of a crime, the acts of one are the acts of each of the others.

APPENDIX F

INSTRUCTION NO. 5

Before you can find the defendant guilty of the crime of UNLAWFUL SALE OF SECURITIES, as charged in Count II of the Information, you must find from the evidence beyond a reasonable doubt all of the following elements:

1. That the said ROBERT SHULTZ, in the County of Spokane, State of Washington, on or about between October 12, 1973 and April 19, 1974, then and there being, did then and there wilfully and unlawfully, either

(a) Employ any device, scheme, or artifice to defraud, or

(b) Make any untrue statement of material fact or omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading, or

(c) Engage in any act, practice, or course of business which operated or would operate as a fraud or deceit upon any person;

2. That said act or acts were done in connection with the offer or the sale of securities to ANNABELLE G. HEIDECKER;

3. That the said defendant, DONALD COX, in the County of Spokane, State of Washington, on or about between October 12, 1973 and April 19, 1974, then and there being, did then and there wilfully and

unlawfully aid, abet, counsel and encourage ROBERT SHULTZ in the commission of the crime of UNLAWFUL SALE OF SECURITIES as aforesaid.

If the State has failed to establish by the evidence in this case, beyond a reasonable doubt, any one of the foregoing elements, then you must acquit the defendant, DONALD COX, of the crime of UNLAWFUL SALE OF SECURITIES, as charged in Count II of the Information.

With respect to elements 1(a), 1(b), and 1(c), these are alternatives, and it is only necessary for the State to prove either 1(a), 1(b), or 1(c); however, it is necessary that all of you agree either to 1(a), 1(b), or 1(c) in order to return a verdict of guilty.

On the other hand, if the State has established by the evidence beyond a reasonable doubt all of the foregoing elements, it will be your duty to find the defendant, DONALD COX, guilty of the crime of UNLAWFUL SALE OF SECURITIES.